In the Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 20

CARNATION COMPANY, a corporation,
Petitioner,

vs.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, and other named persons, defendants, and Federal Maritime Commission, intervener,
Respondents.

Supplemental Brief in Opposition For Respondent Pacific Westbound Conference

EDWARD D. RANSOM
R. FREDERIC FISHER
LILLICK, GEARY, WHEAT, ADAMS & CHARLES
311 California Street
San Francisco, California 94104

Attorneys for Respondent Pacific Westbound Conference, and its member lines.

BORG PRINTING COMPANY OF CALIFORNIA, 109 FIRST STREET, SAN FRANCISCO 5

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 657

CARNATION COMPANY, a corporation,
Petitioner,

vs.

PACIFIC WESTBOUND CONFERENCE, an unincorporated association, FAR EAST CONFERENCE, an unincorporated association, and other named persons, defendants, and Federal Maritime Commission, intervener,
Respondents.

Supplemental Brief in Opposition For Respondent Pacific Westbound Conference

REASON FOR SUBMISSION

This Supplemental Brief is necessitated by the startling position taken in the Memorandum for the Federal Maritime Commission filed by the Solicitor General. In the courts below the Federal Maritime Commission advocated dismissal of the Complaint. Contrary to the Commission's position before the courts below and without any request by peti-

tioner at any stage in the proceedings, the Memorandum asserts that the district court should have retained jurisdiction of the case pending the outcome of proceedings before the Commission.

STATEMENT

In the district court the Commission intervened to move for dismissal of petitioner's antitrust complaint (R. 32-35). It supported this motion with lengthy memoranda. The court granted the motion of the Commission and of other defendants. Thereafter, before the court of appeals, the Commission vigorously and successfully argued that the dismissal of the antitrust complaint be affirmed. At this late stage, speaking through the Solicitor General and the Department of Justice, the Commission, while fully supporting the position of the courts below that primary jurisdiction is in the agency, for the first time asserts that the district court erred in failing to retain the case or stay the proceedings.

It is well settled, however, that a party that has not taken an appeal, or, further, petitioned the Supreme Court for certiorari cannot question the correctness of the decree entered by the trial court (e.g. *Alaska Industrial Bd. v. Chugach Electric Ass'n,* 356 U.S. 320, 325, 2 L. ed 2d 795, 798 (1958); *Mechanics Universal Joint Co. v. Culhane,* 299 U.S. 51, 58, 81 L. ed 33, 38 (1936); *Federal Trade Comm'n v. Pacific States Paper Trade Ass'n,* 273 U.S. 52, 66, 71 L. ed 534, 539 (1927); *United States v. Blackfeather,* 155 U.S. 218, 221, 39 L. ed 126, 127 (1894)). Yet that is what the Commission, purely a respondent here, seeks to do.

Assuming for the purposes of argument that respondent Commission may raise this issue for the first time in a

Memorandum answering the Petition for Certiorari, the Commission's position is both manifestly incorrect and founded on an assumption that is directly contradicted by the Commission's position and statements below. The rationale of the Commission's "Memorandum" is that the case should be retained because (1) there might remain some antitrust remedy available to petitioner after action by the Commission on the issues, and (2) that remedy might in the interim become time barred.

This position fails to recognize that *all* issues raised by the Complaint are covered by the Shipping Act and therefore under the rule of *United States Nav. Co. v. Cunard S. S. Co.*, 284 U.S. 474, 76 L. ed 408 (1932) and *Far East Conference v. United States*, 342 U.S. 570, 96 L. ed 576 (1952) the antitrust acts which would otherwise be applicable to the complaint are superseded.

The Complaint alleges a secret agreement or agreements between ocean carriers setting a rate in foreign commerce. There has never been any question that *all* charges in the Complaint state violations of the Shipping Act. As the Petition for a Writ of Certiorari expresses it: "It is readily apparent that defendants' conduct cannot be squared with the Sherman Act (see Note 4, p. 4 above) *nor with the Shipping Act § 15*" (p. 13, emphasis supplied).

The Memorandum for the Commission at page 4 lists the questions in this case as "[1] whether the alleged secret agreement between Pacific and Far East 'was made in fact; [2] whether, if made, it was contrary to Agreement No. 8200; and finally, [3] whether it would be required to be filed with and approved by the Commission.'" Since the Commission now proposes that the District Court retain the case on the docket "pending the termination of the administrative proceeding," *an essential inquiry is what possible*

decision could the agency make on the three questions which would leave anything for decision by the District Court if the action were retained. The Memorandum for the Commission suggests none. We shall demonstrate that there are none.

Thus, as to Question 1, above, if the determination of the Commission is that the alleged secret agreement was *not* "made in fact," plaintiff's grounds for complaint are nonexistent. If the determination is that it was made, the Commission then proceeds to Questions 2 and 3.

As to Question 2, Agreement No. 8200 is an agreement already approved by the Commission. If the alleged agreement is contrary to the Commission's *own* order of approval, Shipping Act sanctions manifestly apply. If, on the other hand, the Commission decides that the alleged agreement was not contrary to Agreement 8200, it therefore already has the Commission's approval pursuant to Section 15. In either event, there is no issue remaining for decision by the District Court.

As to Issue 3, if the Commission's determination is that the alleged agreement was *not* required to be filed with and approved by the Commission, it could only be because the agreement had already been approved either as part of the separate agreements of one or both of the Conferences or as part of Agreement 8200, the joint agreement between the Conferences. If the Commission decides that the alleged agreement *was* required to be filed with and approved by it, this would only be because the claimed agreement was not covered by the already approved agreements. Admittedly the agreement alleged was not separately filed. Further, it is not possible in this case to decide that the claimed agreement relates to a subject matter outside the scope of the Shipping Act. Accordingly, a decision on Issue 3 that

the alleged agreement was required to be approved by the Commission invokes the sanctions and the remedies of the Shipping Act, which as *Cunard* and *Far East* so clearly determine, are exclusive."[1]

On analysis, therefore, no matter how the Commission could determine the three issues, nothing remains for the District Court. This, until now, has always been the position of the Commission.[2]

Undoubtedly there are some situations in which complete supersession is inapplicable and stay is the proper course. A typical example is where doubt exists whether the matter alleged in the court action falls within the jurisdiction of the agency. Under the doctrine of primary jurisdiction the matter is stayed pending agency determination of its own jurisdiction. Another example is the situation suggested in the *Far East* case where the District Court action is ". . . only incidentally a question proper for initial administra-

---

1. See full discussion Brief of Respondent Pacific Westbound Conference in Opposition to Writ of Certiorari, Sections IV A and B, and Respondent Far East Conference's Brief, pp. 5-7.

2. In its initial Memorandum in Support of Motion to Dismiss, filed with the District Court, it stated, at page 5:

> "Thus, not only are the acts alleged in the complaint proscribed by the Shipping Act, but also plaintiff has an available remedy for the wrongs it alleges by way of complaint before the Federal Maritime Commission under section 22 of the Shipping Act."

In its Answering Brief before the Court of Appeals the FMC stated, at page 4:

> "The issues raised by the complaint, i.e., whether and to what extent the carriers exceeded the limits of their approved agreement, are currently pending before the Maritime Commission in a formal proceeding instituted by the Commission on its own motion."

And in that brief the Commission reiterated the position that the Shipping Act provides the "exclusive remedies" for the wrongs alleged in the complaint (p. 11) and that the Commission is the "exclusive forum for the determination of these issues" (p. 25).

tive decision . . ." (*Far East Conference v. United States*, 342 U.S. at 577).

But as this Court recently stated in *Pan American World Airways, Inc. v. United States:*

> "We think the narrow questions presented by this complaint have been entrusted to the Board and that the complaint should have been dismissed." (371 U.S. 296, 313; 9 L. ed 2d 325, 337 (1936))

and

> "Dismissal of antitrust suits, where an administrative remedy has superseded the judicial one, is the usual course. See United States Nav. Co. v. Cunard S. S. Co., 284 U.S. 474, 76 L. ed 408, 52 S.Ct. 247; Far East Conference v. United States, 342 U.S. 570, 577, 96 L. ed 576, 583, 72 S.Ct. 492." (Ibid at 313 n. 19, 9 L. ed 2d at 337-338, n. 19)[3]

Although the *Far East* decision did discuss the possible alternatives of retention or dismissal, as discussed in intervener's Memorandum, footnote 7, page 6, the decision was that dismissal was the proper course because ". . . the present case involves questions within the *general scope of the Maritime Board's jurisdiction*" (p. 577) (emphasis supplied). This was the true ground for dismissal in the *Far East* case.[4]

---

3. See citation of additional authority to the same effect, p. 33, footnote 29 of Brief of Respondent Pacific Westbound Conference in Opposition to the Writ.

4. Intervener Federal Maritime Commission in its Memorandum in Support of Its Motion to Dismiss filed in the District Court included a separate section entitled, "THE CIRCUMSTANCES HERE REQUIRE DISMISSAL RATHER THAN STAY" in which among other things it stated:

> "As indicated in *Far East Conference*, when a matter is within the general scope of the agency's jurisdiction, as is the instant case, dismissal is proper."

CONCLUSION

The request on behalf of the Federal Maritime Commission should be rejected. Dismissal is the only proper course. The petition should be denied.

Dated: December 17, 1964.

EDWARD D. RANSOM
R. FREDERIC FISHER
LILLICK, GEARY, WHEAT, ADAMS & CHARLES

Attorneys for Respondent Pacific Westbound Conference, and its member lines.

CERTIFICATE OF SERVICE OF SUPPLEMENTAL BRIEF IN OPPOSITION FOR RESPONDENT PACIFIC WESTBOUND CONFERENCE

I, Edward D. Ransom, the undersigned, certify as follows:

I am a member of the Bar of the Supreme Court of the United States and represent Pacific Westbound Conference, one of the respondents in the within case on whose behalf service is hereby certified to was affected.

I certify that on December 17, 1964 I served three (3) copies of the within Supplemental Brief in Opposition for Respondent Pacific Westbound Conference upon petitioner through its attorneys whose appearance have been entered herein and upon other parties respondent through the attorneys who have heretofore appeared for them, by mailing same first class mail at San Francisco, California, postage prepaid, as follows:

Arthur B. Dunne, Esq.
James R. Baird, Jr., Esq.
333 Montgomery Street
San Francisco, California 94104
Attorneys for Petitioner, Carnation Company

Elkan Turk, Jr., Esq.
120 Broadway
New York, New York 10005
Attorneys for Respondent Far East Conference

Archibald Cox
Solicitor General
William H. Orrick, Jr.
Assistant Attorney General
Department of Justice
Washington, D. C. 20530

James L. Pimper, Esq.
General Counsel
Federal Maritime Commission
1321 H Street, N.W.
Washington, D. C.
Attorney for Respondent Federal Maritime Commission

EDWARD D. RANSOM